(5)

No. 91-471

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE;
AND JAMES M. SIZEMORE, JR., COMMISSIONER
OF THE ALABAMA DEPARTMENT OF REVENUE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE RESPONDENT GUY HUNT IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the landfilling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a $72 per ton fee upon such imported hazardous waste.

2. Does a $25.60 per ton levy imposed evenhandedly on the commercial landfilling of in-state and out-of-state hazardous waste violate the Commerce Clause simply because the levy does not apply to non-commercial disposal of hazardous waste, and because Petitioner's commercial activity most often involves out-of-state hazardous waste.

3. Does the Cap Provision, which limits growth in the annual volumes of landfilled hazardous waste and applies evenhandedly regardless of the origin of waste, violate the Commerce Clause.

RULE 29.1 STATEMENT

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STATEMENT OF THE CASE

A. The Landfilling Of Hazardous Waste Is Not A "Safe" Disposal Of That Waste.

Contrary to the repeated assertions of Petitioner CWM,[1] the permanent landfilling of a significant portion of the nation's hazardous waste at the Emelle facility is not a "safe" disposal of that waste. The trial court found that:

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[1] CWM asserts: "The facility plays a critical role in the ***safe*** disposal of the Nation's hazardous waste... [T]he regulations promulgated by the Environmental Protection Agency ("EPA") ... impose elaborate requirements for the ***safe*** handling and disposal of hazardous waste." Pet. 2

1. Hazardous waste landfilled at Emelle includes "substances that are inherently dangerous to human health and safety and to the environment" and consists of "ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." Pet. App. 11a;

2. Among the chemicals buried at Emelle are arsenic, mercury, lead, chromium and cyanide. Pet. App. 59a;

3. **"Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain."** Pet. App. 59a (emphasis added);

4. Despite treatment, many of the substances at Emelle will remain hazardous **forever**. Pet. App. 11a;

5. Landfilling of hazardous wastes produces a poisonous leachate. Pet. App. 11a;

6. **It is inevitable that leachate will leak from closed trenches and spread into the underlying chalk formations; in fact, "it appears that leakage has already occurred with respect to at least some of the closed trenches."** Pet. App. 11a-14a (emphasis added);

7. Preventing leakage of leachate is beyond present technology. *Id.*;

8. Monitoring wells have been installed at Emelle to attempt to monitor the spread of leachate, and "[p]eriodic checks of those monitoring wells will be required **forever**." Pet. App. 14a (emphasis added);

(emphasis added). "The Emelle facility plays a crucial role in the ***safe*** disposal of the Nation's hazardous waste. . . . Act No. 90-326 thwarts the important public goal of ***safely*** disposing of this waste." *Id.* at 29 & 30 (emphasis added).

9. There is uncertainty whether the monitors will detect contamination. *Id.*;

10. **Deposits at current hazardous waste landfilling sites may later have to be dug up and removed.** GAO report at 20 (emphasis added). See *infra* pages 3 & 4;

11. In 1989, **40,000 truckloads** of wastes were transported over Alabama highways to Emelle with 34,000 to 36,000 from out-of-state. *Id.*;

12. "As in operation of the facility, transportation . . . no matter how elaborate the precautions, also creates **unquantifiable** risk or uncertainty to public health and the environment." Pet. App. 62a (emphasis added); and

13. "Some of the trucks destined for Emelle have been involved in accidents causing spillage or release of hazardous waste into the environment; several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility; and **these risks are increased by the increasing volumes.**" Pet. App. 15a (emphasis added).

CWM incorrectly argues that disposal of hazardous waste at Emelle is **"safe"** because it is landfilled in accordance with current EPA regulations.[2] Aside from the specific findings in this case, the deficiencies of these EPA regulations and the ongoing dangers of land disposal of hazardous waste were dramatized by the General Accounting Office's (GAO) findings issued in its June 1990 report to Congress.[3] GAO determined that "land disposal of these [hazardous] wastes presents a significant threat to human health and the environment," and "the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time." *Id.* at 8.

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[2] Pet. 4.

[3] GAO/RCED-90-64, "HAZARDOUS WASTE, Funding of Postclosure Liabilities Remains Uncertain" (June 1990) (Def. Ex. 4).

The report concluded that there is no assurance the current regulations are sufficient in the long term to contain hazardous waste landfilled in disposal facilities, such as Emelle. "[F]or the long-term — beyond 30 years — there are questions about the effectiveness of EPA's current requirements . . . EPA is concerned about the effectiveness of its standards for the long-term prevention of waste migration and the potential for postclosure liabilities." *Id.* at 15. EPA's Science Advisory Board "determined that it is difficult to predict that improved land disposal will be protective of human health and the environment for the long-term." *Id.* at 24. EPA "concluded that there is a need to evaluate and understand the long-term performance of what are now considered environmentally sound land disposal practices to ensure that these practices are environmentally sound for many decades." *Id.*

The following extract from that 1990 GAO report underscores the leakage problem already found to exist at the Emelle facility, as well as the seriousness of the long-term problems:

> University researchers we talked with also said that problems may exist with a long-term effectiveness of current waste containment technology. ***One researcher said that there is little doubt that current hazardous waste facilities will leak.*** He said that present research shows that *these systems will fail at some point, particularly after post-closure care ends,* and that he ***views today's disposal of hazardous waste as merely a storage mechanism for hazardous waste that may have to be removed eventually.*** Another university researcher told us that the technology used today is the best available but that it is simply unknown if it will keep wastes in place.

Id. at 20 (emphasis added).[4]

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[4]The findings of fact in this case and the 1990 GAO report refute CWM's continued reliance (Pet. 4) on the 1989 decision of *Alabama v. United States Environmental Protection Agency,* opining that *"[t]o the extent these federal regulations can and do provide for the safe treatment and disposal of toxic waste,*

The possibility of having to remove the millions of tons of hazardous waste already buried at the Emelle facility is staggering[5] in and of itself. The further unabated build-up advocated by CWM is unthinkable.

Guided only by its profit motive, CWM is creating perpetual health and environmental risks and costs to Alabama for monitoring, maintenance, and eventual clean-up and/or removal.

B. Alabama Must Bear The Risks Of Hazardous Waste Leakage.

A poisonous leachate, formed when seeping rainwater mixes with the buried hazardous waste, is already leaking from at least some of the Emelle disposal trenches. Pet. App. 11a. According to EPA, preventing leakage of leachate is "beyond the current technical state of the art." *Id.* It is impossible to prevent rainwater from seeping into open or closed hazardous waste trenches. CWM presently pumps **10 million to 15 million gallons** a year of leachate from the trenches at Emelle. The cost of gathering, storing and transporting the leachate from Emelle costs **$2 million to $3 million** per year. Pet. App. 12a.

Leakage of leachate from the Emelle trenches occurs in two ways. Leachate can leak downward from the trench into the Selma chalk. *Id.* The second, more serious, concern is lateral

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CWM's Emelle, Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents." 871 F.2d 1548, 1552-53 (11th Cir.) *cert. denied,* 110 S. Ct. 538 (1989) (emphasis added). Those previously lulling words now hold little meaning.

CWM's argument that permanent landfilling at Emelle is safe because it may meet current regulations is akin to saying the Titantic was unsinkable because that ship met then prevailing state-of-the-art standards.

[5]The Emelle facility is the nation's (and probably the world's) largest commercial hazardous waste land disposal facility, Pet. App. 8a. CWM estimates that the Emelle facility has another **100 years** of operating capacity at greater volumes than those predating Alabama Act No. 90-326. *Id.* at 10a.

migration of leachate close to the surface of the trenches. Emelle is located in a drainage basin of the Tombigbee River, which is a major source of fresh water to the State of Alabama. Leachate can flow laterally down the natural drainage gradient into the tributaries of the Tombigbee. Pet. App. 13a. Further, the Selma chalk has unmapped faults and fractures that can accelerate the leakage of leachate. *Id.* at 13a-14a.

Adding to the risk is Emelle's being in an earthquake zone. "[A]n earthquake could unseal cracks in the chalks and open avenues for the movement of leachate and hazardous wastes." Pet. App. 14a.[6]

The leakage or migration of leachate from the hazardous wastes buried at Emelle is monitored by installing and maintaining monitoring wells. CWM estimates of annual monitoring costs of Emelle range from between $100,000 and $200,000 to in excess of $1½ million. Pet. App. 14a. Obviously, the wells cannot monitor all locations, so leakage may go undetected. Also, installing the wells themselves can cause leakage and migration. Pet. App. 14a.

Thirty years after closure Alabama will have the financial burden of maintaining these expensive monitoring systems in *perpetuity*. The trial court found:

> . . . Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, storage, transportation and disposal of leachate from the trenches), and secure the facility forever, CWM has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no

[6]A little over one hundred years ago (1886), an earthquake in the area caused a one-half foot movement in the ground surface. Pet. App. 14a. While a period of one hundred years may be long in human time, it is a particularly short period in geologic time. Given that the wastes buried at Emelle will remain hazardous forever, at some point the recurrence of an earthquake is very likely, and thus, so is the risk of some release of hazardous waste and leachate into the surrounding area and river system.

> provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.
>
> . . . Whenever CWM's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

Pet. App. 15a.

C. There Are Many Other Potential Sites For Hazardous Waste Landfills.

CWM attempts to create the mistaken impression that the Alabama facility is essential for disposal of hazardous waste. However, it has been determined that hazardous waste landfills can be designed to operate in practically every state of the Union. In fact, in a 1973 study EPA identified 74 potential sites for hazardous waste landfill facilities throughout the country, of which Emelle was one. Def. Ex. 41, p. 72. The Emelle facility was quietly opened thereafter in 1977 and was acquired by CWM in 1978. R.T. 4; Def. Ex. 40, p. 2. Since that time there has developed a much greater appreciation of the still not completely known dangers of hazardous waste landfills. With that increasing awareness, "[e]fforts to obtain permits for new sites in other states are resisted by citizens of those states." Pet. App. 9a. New sites have simply not been developed. In fact, since the 1980 effective date of RCRA, only one additional hazardous waste landfill has been permitted. However, it was never placed in operation and currently is for sale. (That facility is located in a town appropriately named "Last Chance, Colorado.") *Id.*

SUMMARY OF ARGUMENT

Under the detailed factual findings in this case, the opinion of the Supreme Court of Alabama does not conflict with deci-

sions of this Court or the federal courts of appeal. The writ should be denied.

With respect to the Additional Fee, the court below correctly applied this Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), to the findings of fact of a real threat to safety and the environment in Alabama. Contrary to the assertions of CWM, permanent landfilling of these huge volumes of hazardous waste is not safe. Given the safety and financial risks to Alabama that will continue in perpetuity, the Additional Fee is a legitimate measure to protect public safety, health and the environment, and is **not** simple economic protectionism.

As to the Base Fee and the Cap Provision, the courts below correctly applied the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test. The Base Fee is evenhanded, applying to both in-state and out-of-state hazardous waste commercially landfilled. Only 1.6% of in-state RCRA hazardous waste is landfilled in Alabama at a site other than Emelle, so 98.4% of those landfilled Alabama wastes are subject to the Base Fee. Accordingly, the Base Fee provision neither discriminates on its face nor in its practical effect. Moreover, the consensus of reported decisions is that commercial hazardous waste facilities pose much greater dangers than non-commercial facilities. The greater risk is a legitimate reason for taxing only commercial facilities.

The Cap provision is an evenhanded measure to slow, but not stop, the amount of hazardous waste commercially landfilled in Alabama. The trial court held, based on the evidence presented, that any burden the Cap might place on interstate commerce is speculative, and the provision does not create a burden on interstate commerce. This Court, and other courts, have held a state may evenhandedly reduce the volumes of wastes accepted for disposal. This decision below is in accord with those precedents.

Under the facts here there is no conflict in decisions that would warrant issuance of the writ.

ARGUMENT

The decision below correctly applies the principles and/or tests announced in *Maine v. Taylor, supra,* and *Pike v. Bruce Church, supra,* to the specific trial court findings of actual threats to Alabama's environment. The petition for writ of certiorari should be denied.

I. The Additional Fee Is Permissible Under These Facts.

A. The Supreme Court Of Alabama Correctly Held That The Additional Fee Is Constitutional.

The dormant commerce clause theory has been asserted to prevent states from engaging in purposeful economic protectionism. However, the Constitutional framers reserved to the States their historic police power to protect the safety and welfare of their citizenry. Accordingly, the Commerce Clause was not intended to, and does not, invalidate all state restrictions on commerce. "It has long been recognized that 'in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.'" *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981).

More recently, in *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), this Court stated:

> . . . [A] State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. See, e.g., *Maine v. Taylor*, 477 U.S. at 138, 151 . . . ; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958; *Hughes v. Oklahoma*, 441 U.S. at 336-337, . . . ; *Dean Milk Co. v. Madison*, 340 U.S. at 354 . . . .

Id. at 278.

This Court then held that a commerce clause analysis must go beyond the face of the statute to its substance. "[W]hat may appear to be a 'discriminatory' provision in the constitutionally prohibited sense — that is, a protectionist enactment — may on closer analysis not be so." *Id.*

Such an analysis was used in *Maine v. Taylor,* where this Court upheld Maine's facially discriminatory statute. Maine's total ban on out-of-state baitfish was upheld because the record showed the purpose of the measure was to protect the environmental interests of the State and was not to protect its economic interests — though certainly the effect of the decision impacted Maine's economic interests. The district court found imported baitfish posed a risk to Maine's environment (to the survival of domestic fish) and there was insufficient technology to give Maine a nondiscriminatory alternative. Based upon the findings of fact, this Court stated:

> Moreover, we agree with the District Court that *Maine has a legitimate interest in guarding against imperfectly understood environmental risks,* despite the possibility that they may ultimately prove to be negligible. "[T]he constitutional principles underlying *the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . .*"

477 U.S. at 148 (emphasis added).

This Court concluded:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently" . . . .[7]

477 U.S. at 151-52.

The decision in *Maine v. Taylor,* then, makes a distinction between state measures which discriminate arbitrarily against out-of-state commerce and attempt to place in-state interests in a position of commercial advantage, i.e., "simple economic protectionism," and state measures which seek to protect public health, safety, or the environment. The decision was based upon the historic police power of states to protect public safety and health.[8] "This distinction between the power of the State to shelter its people from menaces to their health or safety . . . , even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 533 (1949).

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[7] As held by the Alabama Supreme Court (Pet. App. 45a-46a):

> To tax Alabama-generated hazardous waste at the same rate as out-of-state waste is not an available non-discriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country. Here, the statute that creates the Additional Fee does not needlessly obstruct interstate trade, nor does it constitute economic protectionism. It is a responsible exercise by the State of Alabama of its broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

[8] It also follows in the tradition of the "quarantine cases." See *Bowman v. Chicago & Northwestern R.,* 125 U.S. 465 (1888); *Baldwin v. G.A.F. Seelig,* 294 U.S. 511 (1935); *Sligh v. Kirkwood,* 237 U.S. 52 (1915); *Asbell v. Kansas,* 209 U.S. 251 (1908); *Railroad Co. v. Husen,* 95 U.S. 465 (1878).

CWM wrongfully accuses Alabama of "in effect erect[ing] an 'interstate waste keep out' sign at the Emelle facility, and reserv[ing] CWM's waste disposal capacity solely for Alabamians . . . . " Pet. 10. Alabama has not chosen to ban importation of hazardous waste and is not reserving the space solely for Alabama use. Those who want to burden Alabama with the health, environmental, and financial risks of the commercial landfilling of their hazardous wastes are allowed to do so for an additional fee.[9]

As GAO noted, "the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time." GAO report at 8. A risk management and insurance expert, Bernard Webb, testified clean-up costs at Emelle could likely be measured in the billions of dollars. Deposition of Bernard Webb at 48; R.T. 574.[10]

The State is bearing a disproportionate share of the nation's hazardous waste problem, and the Additional Fee addresses the equities of Alabama's bearing this burden. Almost 90% of the 788,000 tons of hazardous waste landfilled at Emelle in 1989 were from out-of-state. The volume landfilled at Emelle in 1989 was 231% over that landfilled four years earlier in 1985 (788,000 tons in 1989 compared with 341,000 tons in 1985). Pet. App. 9a. An equal tax on in-state and out-of-state waste would not fairly and adequately compensate Alabama for the risk of hazardous waste landfilling it must bear. Out-of-

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[9] The state's rationale for imposing the fee is not undermined by virtue of the absence of an environmental clean-up fund, as argued by CWM. *See Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 720 (1972); *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 49 (1st Cir. 1984) ("The Commerce Clause does not require states or courts to trace individual dollars. . . [I]t may pay some costs . . . out of a special fund, while paying other costs out of general revenues. It may finance its expenditures out of general revenues, special taxes, fees, grants, or in other ways.").

[10] Mr. Webb testified that if insurance was available to insure against these contingencies, which it is not, he would recommend one ***billion*** dollars in coverage. He estimated the annual premium for such a policy would range from $100-$150 million. Webb dep. at 82, 92.

state generators may pay a higher fee now, but Alabama will bear in perpetuity the health and environmental risks and the financial responsibility for monitoring, maintenance and ultimate clean-up of the Emelle facility. The state must act now or risk being unable to obtain any meaningful contribution from out-of-state interests. As explained by the Alabama Supreme Court, "The Alabama legislature [did not] ban[] the collection and acceptance of hazardous waste; it . . . merely ask[ed] the states that are using Alabama as a dumping ground . . . to bear some of the costs for the increased risk they bring to the environment . . . [that] will continue in perpetuity." Pet. App. 44a.

B. The Cases Relied Upon By Petitioner Do Not Support Issuance Of The Writ.

The petitioner incorrectly asserts that the decision below conflicts with this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). However, safety was not an issue in the majority opinion in *City of Philadelphia* (which only involved ordinary solid waste or household garbage and not hazardous waste). Because the statute "[o]n its face . . . impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space," 437 U.S. at 628, the majority concluded New Jersey's claim of environmental protection was a pretext for economic protectionism, i.e., reserving the landfill exclusively for New Jersey residents. The basis of invalidation of the statute was hoarding of in-state resources and economic protectionism.

The record here is quite different. The findings of fact by both the trial and appellate courts, with their attendant presumption of correctness on this appeal, establish that landfilling of **hazardous** waste is unsafe. The disposal trenches will leak and there is no way to stop it. Some leakage has already begun at Emelle. EPA has recognized its own regulations for landfilling hazardous waste provide no assurance of long-term safety, with that and attendant problems elaborated upon in

the June 1990 GAO report.[11] The specter was even raised that deposits at current hazardous waste landfilling sites themselves may later have to be dug up and removed. GAO report at 20 (see *supra* page 4). Accordingly, safety is directly at issue.

Unlike *City of Philadelphia, Maine v. Taylor* is a safety case. Moreover, the facially discriminatory Maine statute protected the safety of fish and aquatic life. The Alabama act protects the safety of human life and health. The facts of the instant hazardous waste case are more closely analogous to *Maine v. Taylor* than to *City of Philadelphia*. Accordingly, there is no conflict with the latter decision.

Nor is this instant case in conflict with the four federal court of appeals decisions cited by CWM. Pet. 15-16. *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) concerned a total ban of out-of-state low level radioactive waste; *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982) involved a total ban of out-of-state spent nuclear fuel; *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978) banned out-of-state hazardous waste unless the importing state had a statute in the nature of a reciprocity provision; and a selective *ban* of hazardous waste was the issue in *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991) ("*NSWMA*"). The statute here does not involve a ban of out-of-state waste as did those cases. Also, except for *NSWMA*, those cases predate the *Maine v. Taylor* decision and the very significant and critical June 1990 GAO report.[12]

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[11] The actual experience at Emelle is consistent with the concerns expressed in the GAO report. The leachate leakage already occurring at Emelle documents GAO's concerns about the long-term effectiveness of hazardous waste containment procedures.

[12] It should be further noted that the record in *NSWMA* was completed in 1989. The Eleventh Circuit did not have the benefit of the June 1990 GAO report or the record evidence in this case when it was called upon to decide *NSWMA*.

Moreover, none of those cases involved the comprehensive and explicit findings of fact found in this case as to the dangers, risks and financial consequences of permanent hazardous waste landfilling. There were no factual findings in those cases as there were here that the long-term safety of the disposal regulations were suspect and the landfill facilities had already showed signs of leakage and inability to contain the hazardous wastes and the resulting poisonous leachate.

Additionally, this case proceeded through a four-day trial where the trial court heard expert testimony from both sides and a full presentation of all the relevant evidence. In *NSWMA* the Eleventh Circuit did not have the benefit of a trial record and exhaustive evidentiary presentation. The factual record here distinguishes it from the above cases.[13] This case most assuredly is not one of "commercial rivalr[y] among states," as asserted by CWM. Pet. 10. Accordingly, under the facts of this case there is no conflict with decisions of other courts that would warrant issuance of the writ.

II. The Base Fee Regulates Evenhandedly.

The Base Fee applies equally to interstate and intrastate waste landfilled at commercial hazardous waste facilities. The trial court found "there is only one, relatively small non-commercial hazardous waste landfill facility presently permitted for hazardous waste in Alabama," which "accepts only on-site

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[13] After the filing of the petition, the U.S. Court of Appeals for the Fourth Circuit released its opinion upholding a **preliminary injunction** against enforcement of a South Carolina law in *Hazardous Waste Treatment Council v. South Carolina*, Slip Op., No. 91-2317 (September 20, 1991). (CWM cited the pending appeal, see Pet. 16 n. 8). Unlike the Alabama Act, the South Carolina law provided a mandatory preference for in-state hazardous waste and imposed a selective ban on out-of-state hazardous waste. Again, as in the other cases cited by CWM, there was no trial and no comprehensive findings of fact regarding the safety of hazardous waste landfilling. In fact, the court expressly declined to reach a decision on the merits because there was inadequate factual development. *Id.* at 26.

generated hazardous waste of approximately 4000 tons a year." Pet. App. 16a. In contrast, the trial court found that 788,000 tons of waste were commercially landfilled at Emelle in 1989, and of that volume, "68,000 to 69,000 tons were generated in-state . . . " *Id.*[14] The landfilling of 4,000 tons per year at Alabama's one non-commercial site hardly compares with the scope of CWM's landfilling operations at Emelle.

Significantly, the trial court made a finding of fact that non-commercial facilities in Alabama were *not* comparable to commercial hazardous waste facilities:

> . . . Non-commercial hazardous waste facilities are not comparable to commercial hazardous waste facilities. Commercial facilities are likely to involve the transportation of wastes from off-site locations, and the accumulation and disposal of relatively large quantities of hazardous wastes; most non-commercial facilities dispose of waste on-site, and generally do not involve transportation. The amounts generated and disposed of at non-commercial facilities are far smaller than amounts disposed of at commercial facilities. Accordingly, the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities.
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> . . . .
>
> . . . Should additional commercial hazardous waste landfills be permitted in Alabama, and meet the

[14]Thus, the important distinction under the Base Fee is between facilities which dispose of hazardous waste for a fee and those which do not. For instance, RCRA (42 U.S.C. §§ 6922 & 6924) distinguishes between hazardous waste commercially landfilled and that disposed of on-site by the generator. Hazardous waste commercially landfilled is subject to rigorous manifest systems, restrictions on landfilling, caps on the amounts and concentrations of wastes accepted and monitoring. The distinction under federal law lies in the recognition that commercial facilities pose far greater danger because of the much larger volumes.

> statutory criteria, the provisions of Act 90-326 would apply to them just as they apply now to CWM.

Pet. App. 16a-17a.[15]

The trial court concluded "the legislature's treatment of commercial hazardous waste facilities differently from non-commercial facilities is rationally related to legitimate state interests." Pet. App. 23a.[16] *Cf. Cecos International, Inc. v. Jorling*, 895 F.2d 66, 73 (2d Cir. 1990) (Upholding statute distinguishing commercial from non-commercial hazardous waste facilities against equal protection challenge: "The state provided cogent reasons for requiring siting board approval for expansion of commercial — but not non-commercial — hazardous waste facilities, all of which were found to be legitimate by the district court.").[17]

Because the Base Fee of $25.60 per ton does not discriminate and applies equally to out-of-state and in-state hazardous waste landfilled for a fee, the strict scrutiny test is inapplicable. The courts below correctly determined that the Base Fee was in ac-

[15]The court also found that some of the non-commercial facilities that had accepted on-site generated waste were "no longer in operation." *Id.*

[16]The trial court found:

> [T]he use of commercial disposal sites poses unique health and safety risks . . . and the accumulation in one place of extremely large volumes of different types of waste. The number of trucks delivering hazardous waste to the Emelle facility alone was approximately 40,000 during 1989, and was expected to increase in subsequent years. . . . Moreover, commercial landfill facilities comprise the bulk of the hazardous waste accumulation problem.

Id. at 23a-24a.

[17]The court found the risks of commercial hazardous waste facilities were greater because commercial facilities "are more likely to expand because [of] their profits . . . whereas non-commercial facilities, sited on the premises of the waste generator, lack a profit motive," and "hazardous waste must be transported to the off-site commercial facility." *Id.* at 73. The court found siting board approval was warranted for commercial facilities "to prevent a particular area of the state from housing too many commercial facilities, thereby receiving a *disproportionately large share* of the state's hazardous wastes." *Id.* (emphasis added).

cord with the balancing test of *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

"It is well-settled that states' regulatory powers are greatest when they address traditional matters of local concern such as environmental and natural resource regulation. *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981)." Pet. App. 18a. State legislative measures that are enacted to promote public health and safety are accorded particular deference. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). Challenges to state public safety regulations must overcome a "strong presumption of their validity," *id.* at 444; and courts will not second-guess legislative judgments in comparison with the burdens on interstate commerce, *Kassel*, 450 U.S. at 670. States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. at 138.

The Supreme Court of Alabama applied the *Pike v. Bruce Church* balancing test to the Base Fee. Relying upon the trial court's finding that "CWM has failed to established that the Base Fee has discriminatory effects on interstate commerce," the court found any "burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces." Pet. App. 20a. The Base Fee benefits the state by compensating it for "the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities." *Id.* Comparing the safety, environmental and financial risks of hazardous waste landfilling to Alabama with the "alleged burden on interstate commerce establishes that any such burden is not clearly excessive." *Id.* As this Court has stated, even if the burden of a state regulation falls most often on out-of-state companies, this burden "does not, by itself, establish a claim of discrimination against interstate commerce." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

CWM wrongly argues that Alabama has "gerrymandered" the Base Fee. Pet. 22. When CWM states that "most of the Alabama-generated hazardous wastes" are not disposed of at Emelle (Pet. 18), it includes large quantities of less dangerous

waste water which is either treated or stored in surface containments, but which is *not* **landfilled**. CWM omits the critical fact that 98.4% of Alabama's **landfilled** hazardous waste is in fact **landfilled** *at Emelle*. Def. Ex. 26, p. 45 & Def. Ex. 27, p. 35.[18] Since only 1.6% of Alabama-generated **landfilled** hazardous wastes are **landfilled** elsewhere than at the Emelle facility, Alabama has ***not*** "carved out a substantial exemption from the tax that, as a practical matter, is available only to Alabama generated waste." Pet. 18.

CWM, in attacking the neutral Base Fee, is in essence asserting that the State of Alabama can do nothing to reduce the disproportionate, permanent commercial landfilling of enormous hazardous waste volumes in the state, and the transference to Alabama of all the attendant ills. The Constitutional framers did not intend, and this Court has never held, that private commercial interests are omnipotent or that a state is powerless to reasonably protect the safety of its people and environment. In fact, in *City of Philadelphia*, this Court stated: "And it may be assumed as well that New Jersey may pursue those ends [reducing waste disposal costs and saving open lands from pollution] by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." 437 U.S. at 626. As opined here by the trial court, "[I]n view of the financial, safety, environmental and other objectives of [the] Act . . . and the fact that the Base Fee falls evenhandedly on interstate and intrastate waste, it is difficult to imagine how these objectives could be accomplished in ways that have a lessor impact on interstate activities." Pet. App. 20a.

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[18] In 1987, 313,118 tons of RCRA hazardous waste were landfilled at Emelle. The total of all RCRA hazardous waste landfilled in Alabama that year, including that landfilled at Emelle and that landfilled at other sites in Alabama, was 318,304 tons. Subtracting the amount landfilled at Emelle (313,118 tons) from the total landfilled in the state that year (318,304 tons) shows that only 5,186 tons were landfilled in the state somewhere other than Emelle. Therefore, 98.4% was landfilled at Emelle and only 1.6% was landfilled at non-commercial Alabama sites. See Def. Ex. 26 & 27, *supra*.

The decision of the court below is in accord with the decisions of this Court and other federal courts of appeal. The writ should not issue on the Base Fee.

III. The Cap Provision Applies Evenhandedly.

The Cap Provision applies equally to in-state and out-of-state waste. Therefore, the courts below correctly applied the *Pike v. Bruce Church* balancing test. Like the Base Fee, the Cap Provision regulates evenhandedly in furtherance of a legitimate state interest. The Cap Provision furthers Alabama's legitimate interest in controlling health and safety risks by regulating the volume of hazardous waste landfilled and transported on the highways in any one year.[19] The trial court, after hearing the evidence, found that "any burden the Cap provision might place on interstate commerce is speculative." Pet. App. 27a. The Cap "limits the amount of waste landfilled during the ... benchmark period" and "[t]hus, the Cap creates no discriminating burden on existing levels of commerce or on existing rates of waste generation and landfilling." *Id.*[20]

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[19] Sue Robertson, Chief of the Alabama Department of Environmental Management's Land Division, testified as to the difficulties from the almost 50% increase of hazardous waste tonnage at Emelle in 1989 over 1988. R.T. 310. Receiving the 40,000 truckloads in 1989 caused tremendous difficulties. The trucks were coming into the facility around the clock and were backed-up out the gate. The large volumes impeded ADEM in its regulatory functions. *Id.*

[20] CWM at page 29 of the petition makes unsubstantiated assertions attributing solely to Act No. 90-326 a decline in the volume of hazardous waste received at Emelle since 1989. In a *Wall Street Journal* article of March 21, 1991, p. A4, the following explanation was offered by CWM as the primary reason for the decline:

> The recession has forced many manufacturers to close plants or cut production, thus reducing shipments of hazardous chemicals to Chemical Waste facilities. This accounts for about 70% of the expected 15% to 20% drop in first-quarter revenue — excluding acquisitions — which **[Chemical Waste Management, Inc.] disclosed** late Tuesday. [emphasis added].

Other courts have recognized restrictions on the importation of wastes. In *Diamond Waste, Inc. v. Monroe County Georgia*, 939 F.2d 941 (11th Cir. 1991), the court stated a county may impose daily tonnage restrictions or other restrictions.[21] In *Al Turi Landfill, Inc. v. Town of Goshen*, 556 F. Supp. 231 (S.D.N.Y. 1982), an ordinance was upheld that limited both the amount of land that could be used for solid waste landfilling as well as the size of individual facilities. The court explained that the municipality had a legitimate interest in limiting the volumes of waste.[22] Moreover, this Court stated, "... New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *City of Philadelphia*, 437 U.S. at 626.

CWM misstates to this Court that the Cap provision has an exception that "is available only for Alabama waste." Pet. 8 & 28. The actual wording and effect of Act No. 90-326 is quite different. Amounts in addition to the Cap may be landfilled if "necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law ...." Pet. App. 55a. Alabama has entered into regional

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[21] The court stated: "... Monroe County could reduce the amount of garbage deposited by setting reasonable daily tonnage limits on imported waste and granting permission to dump on a 'first come, first served' basis. Or Monroe County could auction permits for dumping fixed amounts of imported waste. Or dumping rights for out-of-county garbage could be established by lottery.... [T]his is not an exhaustive list of alternatives available." 939 F.2d at 945.

[22] The court stated:

> [T]he DEC decision itself indicates that even a safe landfill is not problem free. Notwithstanding its state-of-the-art design, the ... Landfill can be expected to produce some amount of leachate ... which frequently pollutes ground and surface waters.... [T]he proposed landfill could have an impact on the groundwater between the boundary of the Landfill and Wallkill River.

Id. at 238.

agreements with other states to meet the 20-year capacity disposal requirements of SARA.[23] Under these agreements, other states have contracted to provide capacity for categories of Alabama's hazardous waste and Alabama has agreed to provide capacity for quantities of those states's hazardous waste. Should CWM exhaust the allowable disposal volume in any year through its contracts, then Alabama may have to employ the exception provision to provide for disposal of out-of-state waste it guaranteed in the regional agreements required under SARA. Given the relatively small quantities of Alabama-generated hazardous waste landfilled at Emelle, it is more probable the exception, if ever invoked, will involve out-of-state waste and not in-state waste.

Also, the provision allowing increased volumes under certain conditions is a rational safety valve. Allowing increased volumes to "protect human health or the environment in the state, or to allow the State to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law," is a reasonable and farsighted provision. An increased volume "is warranted [only] in accord with safety or to comply with State or federal regulations." *Id.* at 27a. It is obviously not a subversive attempt to reserve additional capacity for intrastate use as contended by CWM.

The Cap Provision is neutral and applies evenly to interstate and intrastate waste. The decision below is in accord with decisions of this Court and the writ should not issue.

CONCLUSION

The controlling precedent on the Additional Fee is this Court's decision in *Maine v. Taylor*. The controlling test on the Base Fee and Cap Provision is contained in *Pike v. Bruce Church*. The Supreme Court of Alabama has correctly applied

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[23] The Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. § 9604(c)(9).

the principles of those cases to the findings of fact showing actual threats to the health and safety of Alabama's citizens as well as to its environment. Under the facts of this case there is no conflict with decisions that would warrant issuance of the writ.

A state has a primary duty to provide for the safety of its citizens and environment. As evidenced by the detailed factual findings, Alabama was forced to act. However, Alabama properly balanced the safety of its citizens and the need for cooperation with other states. Importers may bring hazardous waste into the state and permanently landfill it. However, they must (and they should) pay an additional fee for the disproportionate risks these tremendous volumes of hazardous waste create. Further, the Base Fee and Cap Provision are evenhanded and appropriate.

The petition in this case should be denied.

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